In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 76-69

EDWARD WALSH, as Trustee in Bankruptcy for
PALMER DATA CORPORATION dba COMPUTERMINAL,
Petitioner,

vs.

UNITED STATES DISTRICT COURT, FOR THE
NORTHERN DISTRICT OF CALIFORNIA,
Respondent,

BURROUGHS CORPORATION,
Respondent and Real Party in Interest.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

JOSEPH M. ALIOTO,
111 Sutter Street, Suite 2100
San Francisco, California 94104
Telephone: (415) 434-2100
Attorney for Petitioner.

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Petitioner, Edward Walsh as Trustee in Bankruptcy for Palmer Data Corporation dba Computerminal, prays that a Writ of Certiorari be issued to review the order of the United States Court of Appeals for the Ninth Circuit rendered June 7, 1976.

OPINIONS BELOW

The order of the Court of Appeals denying the petition for Writ of Mandamus is printed in Appendix A. The opinion of the District Court granting a fourth trial is printed in Appendix B. The order of the District Court supplementing the opinion granting the fourth trial is printed in Appendix C. The judgment entered upon the first jury's verdict is printed in Appendix D. The order of the District Court granting a second trial on damages is printed in Appendix E. The order of the District Court granting a third trial *de novo* is printed in Appendix F. The judgment entered upon the third jury's verdict is printed in Appendix G.

JURISDICTION

The jurisdiction of the District Court was based on 15 U.S.C. § 15. The opinion and order of the District Court granting a fourth trial was filed on April 28, 1976. The petitioner's petition for writ of mandamus was filed on April 30, 1976, pursuant to Rule 21 F.R. App. P. and 28 U.S.C. § 1651. The order of the District Court supplementing the order granting a fourth trial was filed on May 3, 1976. The order of the Court of Appeals denying the petition for writ of mandamus was filed June 7, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 1651.

QUESTIONS PRESENTED

1. Whether the court below has departed from accepted and usual judicial practice by requiring yet a fourth trial before any appeal?

2. Whether the court below abused its judicial discretion and power by requiring a fourth trial before any appeal?

3. Whether the petitioner is being effectively deprived of its Constitutional right to trial by jury by being required to continuously try its case?

4. Whether the petitioner is being effectively deprived of its right of appeal by facing continuous "non appealable" orders for new trials?

5. Whether the petitioner is being effectively denied the mandate of Rule 1 F.R. Civ. P. which requires "the just, speedy, and inexpensive determination of every action"?

6. Whether the intent and purpose of the private antitrust suit is effectively thwarted by the continual granting of new trials?

7. Whether the judgment entered upon the verdict of the third jury should be reinstated?

STATEMENT OF THE CASE

A. Nature of the Action

This is a private antitrust suit brought under Section 4 of the Clayton Act (15 U.S.C. § 15) for damages caused by reason of the defendant-real party in interest's violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

B. Parties

The petitioner-plaintiff is Edward Walsh, Trustee in Bankruptcy for Palmer Data Corporation dba Computerminal. After the complaint was filed by Palmer Data Corporation, Burroughs, the defendant-real party in interest, petitioned Palmer Data into bankruptcy and is the sole creditor in those proceedings. Subsequently, the plaintiff-petitioner Walsh was substituted as party plaintiff below.

The respondent is the United States District Court for the Northern District of California.

The defendant-respondent (real party in interest) is Burroughs Corporation.

C. Course of the Proceedings Below

The Complaint was filed in March, 1971.

The First Trial: In February, 1974, the first trial commenced before a jury. In March, 1974, after a four week trial, the jury returned a unanimous verdict in favor of the plaintiff and assessed damages in the amount of $1,270,500. The judgment was entered on March 13, 1974. (Appendix D). In May, 1974, the District Court denied Burroughs' motions for judgment notwithstanding the verdict and for a new trial on liability, but ordered a new trial on damages. The order was filed on June 25, 1974. (Appendix E).

The Second Trial: In October, 1974, the second trial commenced before a jury. Prior to trial, the District Court advised the parties that if it appeared that the damage issues could not be justly tried without the evidence of liability, a new trial *de novo* would be ordered.

In November, 1974, the jury returned a verdict against the plaintiff. On February 12, 1975, the District Court ordered a new trial *de novo* and assigned the third trial to the Honorable Charles E. Wyzanski, Jr., Senior Judge, sitting by special designation. (Appendix F).

The Third Trial: In January, 1976, the third trial commenced before a jury. In February, 1976, after a five and one-half week trial, the jury returned a unanimous verdict in favor of the plaintiff and assessed damages in the amount of $1,162,000. Judgment was entered on February 6, 1976. (Appendix G). In April, 1976, the District Court denied Burroughs' motion for judgment notwithstanding the verdict, but ordered a new trial *de novo*, the fourth trial (Appendix B).

The unanimous verdict in the Third Trial ($1,162,000) was two years later and $108,500 less than the unanimous verdict in the First Trial ($1,270,500).

THE REASONS FOR GRANTING THE WRIT

Being well aware that an extraordinary writ will not lie in an ordinary case where a District Court has granted a new trial, petitioner Walsh asserts that this case is extraordinary in the extreme and is precisely the kind of situation which the extraordinary writ was designed to remedy.

The writ should issue for the following reasons, among others:

(1) A fourth trial raises the substantial question of how many times a party must win his suit before a District Court will recognize it;

(2) The new trial demonstrates that appellate review will not be permitted unless and until the judgment of the facts by the District Court is imposed upon the complaining party;

(3) The facile and repeated overturning of unanimous verdicts illustrates the effective denial of the right to trial by jury and the reduction of the otherwise living document of the Constitution to a dead letter piece of paper;

(4) A fourth trial raises the substantial question of whether the law will permit monetary attrition, especially as here where petitioner is a bankrupt estate, to take the place of the administration of justice;

(5) The course of proceedings below is the gravest possible threat to the private enforcement of the antitrust laws, giving aid and comfort to antitrust violators, thwarting the public policy announced many times by this Court, and rendering useless and meaningless the decisions which have issued to preserve the vitality of the antitrust laws;

(6) Four protracted trials of the same case make a mockery of any efforts to relieve the overcrowded and congested calendars of the Federal Courts by encouraging antitrust violators to proceed to lengthy and complex trials, regardless of their guilt, with a promise of a second, third, and fourth chance, if not more; and

(7) Four trials of the same case does not foster public confidence in the administration of justice in the Federal Courts.

ARGUMENT

The petitioner Walsh is being deprived of his right to trial by jury and, at the same time, his right to appeal. The District Court refuses to accept the verdicts of the juries while, at the same time, prohibiting the petitioner from challenging these decisions through the appellate process.

In addition to the abuse of discretion by the Court below, mandamus is proper to review an effective denial of the Constitutional right to trial by jury. In *Beacon Theater, Inc. v. Westover,* 359 U.S. 500 (1959), the petitioner in that case sought by mandamus to require a district judge to vacate certain orders which allegedly deprived the petitioner of a jury trial. The Court of Appeals for the Ninth Circuit refused the writ, holding that in that case the trial judge had not abused his discretion. 252 F.2d 864. The Supreme Court said:

> "We granted certiorari, 356 U.S. 956, 78 S.Ct. 996, 2 L.Ed. 2d 1064, because 'Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.' " 359 U.S. at 501.

In addition, the Supreme Court said:

> ". . . the right to trial by jury applies to treble damage suits under the antitrust laws, and is, in fact, an *essential* part of the congressional plan for making competition rather than monopoly the rule of trade, ..." 359 U.S. at 504 (emphasis added).

The issues involved in the *Beacon* case pale when juxtaposed with the extraordinary circumstances presented by this petition.

The Opinion by the District Court after the Third Trial (Appendix B) illustrates that the District Court overlooked certain facts, misapprehended other facts, and inexplicably found facts which either never existed or which, at best, were nothing more than Burroughs' unsubstantiated argument. The analyses of the facts by the District Court in the Opinion are largely the same as those made by the District Court to the third jury after the Court had finished giving the instructions. (See pages 2886 to 2897 contained in the appendix attached to the Opinion of the Court). The Court began the analysis by advising the jury that: "I underline as strongly as I can that from now on anything I say you may disregard. I am not now hereafter giving you any instructions on the law. This is not entitled to any more weight than you want to give it." (2886-2887). The petitioner very respectfully submits that the analysis was largely incorrect and amounted to an argument for the defendant. In any event, the jury chose not to follow it. If there be a fourth trial, and if another jury refuses to follow the District Court's view of the evidence, then there apparently will have to be a fifth trial, and so on. The consequence of this, of course, is not only the effective denial of a jury trial but also a denial of any right to appeal. The extraordinary Writ, therefore, is the only way that the plaintiff-petitioner can be rescued from the circular entanglement of trial—new trial, trial—new trial which the District Court is compelling.

In addition, the District Court has now announced its intention to restrict the petitioner's evidence in the fourth trial. In the instant case, and notwithstanding two unanimous verdicts in two complete trials, the District Court, as delineated in the attached supplemental order (Appendix C), has stated "[N]othing in any previous order or this order indicates that this Court will permit to stand a judgment which awards plaintiff damages for any period after July 1970 . . ." (Exhibit A, para. 3).

This unilateral determination after three trials by the District Court limiting the possible amount of damage which the plaintiff can recover by arbitrarily restricting a time period is directly contrary to (1) the District Court's instruction to the jury that this specific issue is a question of fact (2884-2886; 2895-A, Appendix attached to Appendix B); (2) that the defendant has the burden of proof with respect to this fact (2884-2886; 2895-A, supra); (3) there is no competent evidence to support such a fact and (4) that the far greater weight of the evidence, if not the undisputed evidence, is in accord with the verdicts of the juries in both the first and third trials.

So far as the petitioner Walsh is aware, there are no antitrust cases, or, for that matter, any Federal cases whatsover, which permitted four trials in the same case prior to appellate review or which have permitted lower courts to rule that certain levels of damages will not be permitted in subsequent trials. It appears that what is happening here has never happened before. The closest case which petitioner has been able to find is *Kanatser v. Chrysler Corp.*, 199 F.2d 610 (10th Cir. 1952)

in which the Court, so far as is pertinent to this petition, said:

> "Ordinarily, on a retrial of the case the order of the court granting the new trial for the stated reasons, could be assigned as error and brought here for review from the final judgment on retrial . . . And, given this unfettered remedy, w. should be inclined to withhold the issuance of the writ for pursuance of the more conventional procedure. But here, the trial court has stated on the record, in effect, that under no circumstances would he permit a verdict in excess of $15,000 to stand. If this statement is accepted on its face, it means that other trials of the case resulting in a verdict in excess of $15,000 would never reach this court for review of the order, sought now to be reviewed, for each case would result in an unappealable order granting a new trial. It follows from the record that if the petitioner is to have a right of appeal from an appealable order he must have it now, and the writ is therefore granted."
>
> 199 F.2d at 616.

In *Kanatser, supra,* the Tenth Circuit granted petitioner's Writ of Mandamus on the grounds that the District Court, in ordering a new trial, "has stated on the record, in effect, that under no circumstances would he permit a verdict in excess of $15,000 to stand." 199 F.2d at 616 (See Petition, p. 7, line 26 to p. 8, line 20).

It is respectfully submitted that in this case, if the petition is not granted, the petitioner will not escape from the District Court until the District Court has substituted its view of the facts for that of the jury.

CONCLUSION

For the reasons and authority stated, petitioner prays that a writ issue so that a decision can be had without further retrials *ad infinitum* and so that this case can be finally terminated.

Dated, July 6, 1976.

JOSEPH M. ALIOTO,
Attorney for Petitioner.

(Appendices Follow)

APPENDICES

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 76-1967

Edward Walsh,
Petitioner,
vs.
United States District Court for the Northern District of California,
Respondent.

[Filed June 7, 1976]

ORDER

Before: ELY and KENNEDY, Circuit Judges.

The petition for mandamus is denied.

/s/ Walter Ely
/s/ Anthony M. Kennedy
United States Circuit Judges

Appendix B

United States District Court
Northern District of California

C 71-479 SAW

Edward Walsh, Trustee in Bankruptcy for Palmer Data Corporation,

vs.

Burroughs Corporation,

[Filed April 28, 1976]

OPINION

WYZANSKI, Senior District Judge.

Defendant has filed motions to set aside the jury's general verdict in favor of plaintiff in the amount of $1,162,000 (before trebling and attorney's fees), and to enter judgment for defendant *non obstante veredicto*.

In connection with these motions, the appropriate course is to view the evidence in every way most favorably to plaintiff.

From that approach, it appears that a jury could reasonably have found the following facts.

Defendant's supervisory employee, Browne, acting within the scope of his authority over batch data com-

puter operations, proposed in 1969 that defendant, a national manufacturer of computers and the operator of a batch data computer center in San Francisco, should abandon its San Francisco operations and salvage from that center the value which inhered in the good will of those who were its customers, by selling the accounts of those customers to some other batch data computer center which operated Burroughs machines.

The outstanding prospective purchaser was Computerminal, Inc., of which Palmer was the president.

Browne and another Burroughs employee, Lowe, approached Palmer with an offer to sell the so-called customers' contracts for $150,000. There were in fact no contracts because the written draft contracts for 1970 had never been executed by Burroughs, and there had not been that mutuality of understanding expressed by the acts of the parties which created what are sometimes called contracts by conduct. Moreover, those arrangements which Burroughs had with its customers did not impliedly nor expressly contemplate that Burroughs could delegate performance of computer service to other centers except with the express consent of the customers. Palmer, therefore, concluded that Burroughs had nothing to sell, and so, after investigation, declined to make the purchase.

Angered by this turndown, Browne intemperately wrote a memorandum to his chief, Bailey, indicating a punitive attitude toward Computerminal. Bailey has left Burroughs and has not been located by either party to this case. We do not know his attitude nor that of any other high Burroughs official.

However, we do know that Browne approached another computer operator, Cubit, Inc., which had never served the general public in the City of San Francisco but had, in its capacity as a subsidiary of Purity Stores, Inc., done computer work in Burlingame, a city in the Bay Area about 20 miles from San Francisco. After discussions, Cubit agreed to pay $150,000 for the Burroughs accounts and for an old model B-300 Burroughs computer. Because Burroughs wanted to keep secret the fact that it was being paid for its customer list, and because Cubit wanted to get a large loan from a bank, Cubit, with Burroughs' connivance borrowed $150,000 from a bank by falsely representing that the proceeds of the loan would be used by Cubit exclusively to buy the B-300 Burroughs computer.

Then Browne and Lowe, as representatives of Burroughs, jointly with representatives of Cubit visited each of the customers of Burroughs and informed them that Burroughs was transferring its computer operating business in the San Francisco area to Cubit, and solicited the customers to use Cubit's center. In this connection, the representatives of Burroughs expressly or impliedly represented that these customers had binding annual contracts with Burroughs, and that Burroughs' delegation of performance to Cubit was permissible under such contracts. Both of those representations were false, and Burroughs' representatives knew (or should have known) at least that the so-called contracts had never been accepted by Burroughs.

Not content with initial visits of explanation to their customers, the Burroughs representatives pursued in

some, but not all, cases customers two, three, or more times, and in a few cases sent letters, until all but two of the customers consented to have their work done by Cubit. At no time did the Burroughs representatives explain to customers that for this transfer Burroughs was being paid, nor that Computerminal had, in its B-2502 Burroughs machine, better equipment than Cubit had, nor that Computerminal was physically closer to customers and in that respect might be a more satisfactory center. One customer, Arnstein of Forbes, indicated that he felt that his company's best interests were not being considered.

Had Burroughs not supported Cubit, it is probable that since Computerminal had in April 1970 the best service to offer to batch data process customers in San Francisco, the former Burroughs customers would in many instances have taken their work to Computerminal. But as a result of Burroughs' visits and follow-up letters including, in a couple of instances in May 1970, a threat from Burroughs to leave the former customers without any service after July 1970, all but two of Burroughs' customers went to Cubit, and of those two one went to Computerminal and the other ceased to have its batch data work done by any Burroughs center.

During the conferences of representatives of Burroughs, representatives of Cubit, and customers of Burroughs, the representatives of Burroughs never expressly commented on Computerminal. Yet the praise of Cubit carried with it an inference that no other center would in Burroughs' view be equally satisfactory in handling the Burroughs' customers' work.

However, despite plaintiff's argument, there is in the evidence no basis for an express nor an implied disparagement of Computerminal as a competent computer center generally. So there was nothing adverse to Computerminal to be carried on a "grapevine" to prospective potential customers of Computerminal who had not previously dealt with it or with Burroughs. Even if, as a Computerminal salesperson, Stumpf, testified, the demand for the services of Computerminal suddenly fell off after April 16, 1970, that drying-up cannot be traced to, and was not caused by, any Section 1 violation by Burroughs.

If there had been no April 16, 1970 contract between Burroughs and Cubit, if it remained in business, Computerminal in 1970 and in each succeeding year through 1975 would have had $275,000 of gross receipts from Burroughs' former customers.

The incremental costs of securing those gross receipts would have been on the view most favorable to plaintiff:

(1) large sums for key-punch machines and operatives;

(2) Some amount for other additional personnel, even if the jury found, as it might have, that Computerminal on April 16, 1970, already had on hand a reasonable excess capacity to take care of new business, on an optimistic prognosis. That is, on April 16, 1970, in the light of reasonable expectations of the gradually increasing business which would be likely to flow to a newly-started business, Computerminal had more floor space than it was currently utilizing, more machine time on the B-2502 than it was currently utilizing, and more personnel than it was currently utilizing. The jury could have found that such stand-by capacity with respect to premises, to

machines, and to personnel was not obviously wasteful, nor economically improper but was just justifiable as a bait for future business and as an immediately available resource in the light of plausible needs in the near future.

(3) Some allowance for "simulation" (that is, the cost incurred in giving additional program instructions to a B-2502 Burroughs computer to enable it to perform work which had been originally performed pursuant to programs designed for a B-300 Burroughs computer); and

(4) Some amount for the temporary rental of a B-300 Burroughs computer.

No matter how those deductions from gross receipts are calculated from Palmer's own testimony, the resulting potential net earnings from the former Burroughs customers could not reasonably be found likely to have a reach of $1,162,000 in the years April 16, 1970 through December 31, 1975.

And, as already noted, there is no causal basis for allowing plaintiff any damages on account of its failure to get wholly new customers never serviced by Burroughs nor by Computerminal.

From the foregoing analysis it follows that the verdict must be set aside on two wholly independent grounds.

First, there was no evidence to show directly, or to support indirectly, an inference, that Burroughs disparaged Computerminal as a center. At most, there could have been an inference that to its own customers Burroughs had indicated that for their special purposes as current contractual customers of Burroughs, with programs already designed and utilized, Computerminal was

not so satisfactory as Cubit. There is no inferential or other basis for the claim that Burroughs disparaged the availability, competence, financial ability, or other qualities of Computerminal generally as a batch data computer center operating in San Francisco with or without a Burroughs machine, or in any aspect whatsoever, except in comparison with Cubit as an outlet for Burroughs' customers. Hence, it was improper to have admitted evidence as to damage with respect to possible receipts from such potential new customers. It was improper to have charged with respect to such an element of damages. [See the full text of the charge, attached hereto as an appendix.] And it is not possible, in the absence of a special verdict and of special questions, to know how much of the $1,162,000 figure in the general verdict is properly attributable to those errors. Quite possibly, in the light of the arguments of counsel, approximately half is so attributable.

Second, independently of the heretofore recited set of errors, the verdict is excessive even if by legerdemain or a *tour de force* it could be hypothetically related solely to damages allegedly caused by the Burroughs interference with Computerminal's getting Burroughs' customers. One difficulty would be that Palmer himself admitted that he never wanted more than five or so of the eighteen or twenty customers, and Computerminal did, despite the alleged interference by Burroughs with the free choice of its customers, get one of those customers, and, moreover, Zusman, without contradiction, testified that his concern felt free to go to Computerminal, and did consider Computerminal on its merits, but preferred Cubit. However,

those are not the main points. The main points are that in Palmer's own testimony there is not evidence to show that Computerminal's net earnings from the supposititious business which it might have had a chance to get from Burroughs' customers and which it might have wanted to handle, would have amounted, after making deductions which Palmer himself ultimately conceded had to be made, to $1,162,000 from April 16, 1970 to December 31, 1975. Such a figure is grossly inflated on plaintiff's own testimony.

It would, of course, be possible to set aside only so much of the verdict as relates to damages and to permit the verdict as to liability to stand.

But experience in two earlier trials in this very case shows that this is a dangerous course. Judge Weigel first set aside so much of a jury verdict of $1,200,000 as involved damages, but, preserving that part of the verdict which related to liability, conducted a second trial on damages. The second jury returned a verdict of no damages. Whereupon Judge Weigel set aside both that second verdict and the remaining part of the first verdict. It is easily foreseeable that Judge Weigel's experience might be repeated were this court now merely to set aside only the part of the verdict relating to damages.

Moreover, it is clear to one who has sat for five weeks as a judge hearing evidence in this case that the facts relating to liability and to damage, as well as to causation, are inextricably interwoven.

Nor would there be any material saving of time nor of expense in such a partial setting aside of a verdict.

Nor does justice demand that plaintiff be allowed to keep so much of its verdict as may relate to liability. While this court has reviewed scrupulously the record to search out what is the most favorable analysis from plaintiff's view of the evidence, the court has not said, and does not now say, that taken as a whole the evidence is sufficient to withstand the defendant's motion to set aside the verdict in every aspect on the ground that it is against the overwhelming weight of the evidence as to liability. However, it is unnecessary for the court to pass on such a contention, inasmuch as the verdict is fatally vulnerable on the issues of causation and damages.

However, out of an abundance of caution, this court adds that it does regard the overwhelming weight of the evidence as indicating *first,* that despite Browne's suggestion that measures be taken against Computerminal, *authorized* officers of Burroughs never had a specific intent to destroy Computerminals batch data business; *second,* that if Burroughs coerced any of its customers, it did not coerce the vast majority of them; *third,* that Burroughs merely sought to salvage something from its San Francisco center; *fourth,* that there was inherent in Burroughs' San Francisco business a goodwill item of substantial value which flowed not from firm contracts but from the warranted expectations of continued patronage, and such an item of good will was recognized by Palmer himself in connection generally with batch data computer centers, for when he came to value Computerminal he testified that there should be included in the value the expectation of business to be received, and he did this although the expectations were with respect to merely

potential customers with whom Computerminal had never had business relations; *fifth,* that Burroughs in its misrepresentations did not have any anti-competitve intent, but merely a greedy intent to get as much as possible from its salvage operations, together with a prudential, if somewhat duplicitous, intent to avoid firm written contracts until it could sell them; and *sixth,* that Computerminal was legally committed to withdraw from the batch data computer business as promptly as possible after the Solomon Brothers and Hutzler deal collapsed, and so under no circumstances could damages be allowed for any period after July 1970. Motion for judgment n.o.v. denied. Motion to set aside verdict granted.

Charles E. Wyzanski, U.S.D.J.

Apr 28, 1976

Appendix to Appendix B

INSTRUCTIONS TO THE JURY

[2862] THE COURT: Good morning, members of the jury.

Ladies and gentlemen, yesterday before counsel argued I gave you some instructions, and I am now going to complete my instructions, and I shall first deal with points of law as to which what I say binds you. Thereafter, and I will make it quite plain when the break occurs, I shall turn **[2863]** from points of law to what seem to me to be analytically the factual problems in the case. When I come to this analytical part, whatever I say you are wholly free to disregard. I shall try to be fair to both parties in the analysis, but when a judge deals with factual questions even by way of analysis or illustration, the jury is not bound by what the judge says.

The only reason that I will engage in this analysis is because this is a case which has lasted five weeks, is in its essence very complicated, and falls within a field where perhaps I have had an experience which is worth laying before you for such appraisal as you see fit. In that analysis, however, I no more bind you than counsel bind you by their arguments. I will make it quite plain when I come to the analysis as distinguished from the instructions which are binding upon you with regard to the law.

You recall that yesterday when I began the instructions to you, I circulated to you the pretrial order in

this case and I read it to you while you had it in your hands. That pretrial order was signed by counsel for plaintiff and counsel for the defendant and by one of the regular judges of the United States District Court for the Northern District of California. I had no more to do with it than you had. But, that is a pretrial order which becomes binding upon you as upon me, as well as upon the parties. Neither you nor I has **[2864]** any right as the pretrial order stands in its unamended form, to go outside the scope of that pretrial order in considering what are the issues in this case. That doesn't mean that we can't subdivide the issues, but we can't bring into the case entirely new issues, new parties or anything which is not fairly within the coverage of the pretrial order.

The parties engaged in their pretrial discovery and in their preparation of this case in the light of the pretrial order. I made my rulings during the case in the light of the pretrial order, and your verdict and my charge should be within the scope of that pretrial order.

Now, I need not remind you, I think, that anything that counsel has said or that I have said or will say about the credibility of witnesses is merely intended to help you and does not control you. You are the persons who are to decide which witnesses to believe, which exhibits to believe, if you believe any of them. You are not required to believe anything, it's entirely up to you. And as I said to you, there is no rule of law which tells you that one kind of testimony in this case is better or worse than another kind. And the standards that you will apply in judging the truthfulness of witnesses are primarily the standards of common sense and ordinary experience.

Now, I have already said to you also that there are, as both sides agree, no problems now of whether interstate **[2865]** commerce is involved in this case. So far as you and I are concerned, the parties have agreed that insofar as interstate commerce is a fact necessary to prove with respect to jurisdiction or with respect to substance, there is an agreement to treat the fact as though it has been adequately proved. Don't bother about interstate commerce at all. From now on forget it.

It's also agreed between the parties, as you can tell from the pretrial order, that there are three main issues in this case. First: Did the Defendant Burroughs Corporation violate Section 1 of the Sherman Act by engaging in a combination, conspiracy or contract in restraint of trade, as that term is used in the statute called the Sherman Act, an act passed in 1890.

The second issue is whether if there were such a violation, was that violation the proximate cause, was it a substantial cause, not necessarily the only cause, of injury to the plaintiff. And the plaintiff in this case is the trustee in bankruptcy Walsh, successor by operation of law to Palmer Data Corporation, which, in turn, acquired any claim that Computerminal Corporation had with respect to antitrust or any other dispute.

You will not have to bother at all with the fact that the plaintiff's name is Walsh. You and I aren't the slightest concerned with how he got this claim, but the claim **[2866]** that he makes is in essence a claim which originally was Computerminal's and which passed by assignment through an intermediate step to Walsh.

The third issue in this case is whether if there was a violation of Section 1 of the Sherman Act by Burroughs Corporation, and if that violation was a substantial cause of injury to Computerminal Corporation, what are the recoverable damages. On each one of those three issues, the burden of proof rests upon the plaintiff. The burden of proof is the burden of persuasion, it does not mean persuasion to a moral certainty or beyond a reasonable doubt, it merely means persuasion in the sense that you have concluded that it is more probable than not that the plaintiff has proved Item 1, Item 2, Item 3. The plaintiff gets absolutely zero unless he proves one plus two plus three. It will not do to succeed on one and not on another. All three of those items are essential for a recovery by the plaintiff, insofar as the plaintiff bears the burden of proof and if in your view that proof ought to include some item, if the item is missing then the plaintiff is to be blamed, not the defendant.

If in your view in order to satisfy the burden of proof, for example, certain customers or certain officers or certain other persons knowledgeable in one way or another by observation or in any relevant way are not here, and in your view ought to be there on the issues where the plaintiff **[2867]** bears the burden of proof, you cannot fault the defendant for the failure to bring these people. It is the plaintiff's obligation to bring the proof which satisfies you with respect to each of these issues.

Now, I'm going to turn to a general discussion, still as a matter of law, of the Sherman Act, and I think it is very necessary that you bear what I say in mind here carefully in your minds, because there was some argu-

ment which I think was in a direction contrary to what I am going to say, and what I am saying is binding on you.

When Congress passed the Sherman Act in 1890 it did not purport to deal with the whole field of unfair competition. I am not referring to the fact that it didn't deal with local as well as interstate matters. What I am saying to you is that Congress in the Sherman Act dealt with only some but not all kinds of unfair competition.

For example, Congress didn't deal with breaches of contract in ordinary cases. Congress did not deal with fraud, in ordinary cases. Congress did not deal with interference with advantageous business relations, in ordinary cases. Congress did not even deal with all unfair methods of doing business in interstate commerce. It was not until much later in the administration of Woodrow Wilson that Congress endeavored to reach unfair methods of doing business in interstate commerce, and then when it did it left **[2868]** the supervision of them to a commission, an administrative body, the Federal Trade Commission. There are some kinds of unfair means of doing business which are plainly unfair, some kinds of unfair, competition which are plainly unfair which are not covered by the Sherman Act.

There are many reasons for that. The Sherman Act in some of its aspects carries criminal penalties as well as civil sanctions. You are not dealing with the criminal side of this. Moreover, there are certain kinds of civil advantage which I am not going to discuss with you, because they are not your concern, but they are advantages which a plaintiff gets in this kind of proceeding

which he would not get in an ordinary unfair competition suit either in the federal or state courts.

So what you are here dealing with is a very special kind of statute. It has two main parts to it on the side of what is outlawed or forbidden or regarded as a violation, and one section has to do with combinations and contracts in restraint of trade, and that's covered by Section 1.

And the other part with which you are not the slightest bit concerned, is Section 2 which relates to monopolizing or attempting to monopolize commerce. Now this case has nothing to do with Section 2 of the Sherman Act. The pretrial statement makes it quite plain that what we are dealing with here is a claim of the violation of **[2869]** Section 1 of the Sherman Act, which is directed at combinations, contracts and conspiracies in restraint of commerce. I am not going to spend any time talking to you about what the word "combination" means, or the word "contract" means, because I think it is quite plain to you at once that the words "combination" and "contract" involve the participation of more than one person.

If there is a restraint of trade participated in by more than one person and one of the persons has a purpose to accomplish the restraint and get the support of another person, it doesn't make any difference whether that other person shares the first person's purpose, motive or the like, it is sufficient that one of the parties to the combination has the specific intent and the other cooperates willy nilly. But the real difficult problem, and it's so difficult that nine justices of the Supreme Court wouldn't

agree on the point, is to define accurately the phrase "restraint of trade."

What every informed judge and justice would tell you is that it doesn't mean every restraint of trade. Ever since the time that as he then was Associate Justice, Edward Douglas White in 1911 decided the Standard Oil and American Tobacco cases, it has been clear that the only restraints of trade which the act applies to are unreasonable restraints of trade. That doesn't help you very much, but at least you know that there are some kind of restraints of trade which are **[2870]** covered and some that aren't. Mr. Justice Brandeis helped us a little bit more a half a dozen years later when he told you that you look at all the surrounding circumstances under which the restraint operates, and he pointed out what everybody always quotes him as saying, that every contract binds and restrains and it cannot be true that every contract is an impermissible restraint of trade.

Let me give you an example not unlike one I gave you the other day, perhaps a little closer to the problem here. A owns a business. X wants to buy it, Y wants to buy it, Z wants to buy it. A makes a contract to sell it to X. There were no other facts but those I have told you. Can it be that that contract is an impermissible restraint of trade? Of course it is a restraint which prevents Y from buying the business, because A is selling it to X, it's a restraint which prevents Z from buying the business, because A is selling it to X. But if you said that this was an impermissible restraint of trade then A couldn't sell the business to anybody. So it must be a reasonable restraint of trade, if all that is involved in

the situation is that a person who owns a business and enters into a contract to sell it to one of a number of difference persons and other persons are thereby, as it were, restrained from buying it. But now let me add another possible fact to the hypothetical case I have put.

[2871] Suppose that A is a very important factor in the market and has, let us say, 30 percent of the business. And let us suppose that X has 30 percent of the business, and Y and Z each have 20 percent of the business. And under these circumstances A, without giving Y and Z an opportunity to bid on the situation sells his 30 percent to X who already has 30, and the new AX company has 60 percent of the market, under those circumstances where the sale promotes or might be thought to promote an attempt to monopolize the market and to subject Y and Z to competition by an overwhelmingly strong antagonist, it very well might be that there is an impermissible unreasonable restraint of trade in that combination.

Now, with respect to restraints of trade I have to give you some general background, rather briefly, but in order that you may understand what this phrase "specific intent" means, which was used to you in argument and which I shall have to use in my charge.

First, let me tell you what the words "specific intent" as used in connection with Section 1 of the Sherman Act mean. Specific intent as there used means an intent either to monopolize or to exclude from the market, or engage in that kind of anticompetitive conduct which, as it were, freezes somebody out of the market or squeezes in a way which indicates something more than normal competition,

speaking generally, or a wrongful act of a defendant which might not possibly injure a **[2872]** competitor. But I told you quite a few moments ago that the Sherman Act doesn't cover every wrongful act. It doesn't cover every breach of contract. It doesn't cover every fraudulent act. It doesn't cover every kind of interference with advantageous contractual relations. It doesn't cover every kind of disparagement. It doesn't cover every kind of unfair method.

In order to satisfy the phrase "specific intent" as I said to you a moment ago, there must be, when specific intent is required, an intent to monopolize or to exclude from the market or to freeze out of the market or to squeeze by a peculiarly anti-competitive method. Merely injuring is not enough. Breaches of contract injure, or may. Frauds injure, or may.

Now, there are certain situations in which the plaintiff in order to succeed in a Sherman Act proceeding is not required to prove specific intent, because by a series of prior cases and rulings the courts have reached a conclusion that when you engage in a conduct of a certain kind there is an implied specific intent to monopolize, to exclude, to freeze, to squeeze, or whatever you like.

For example, if dominant forces, dominant enterprises in a given market agree to fix and maintain prices that is what is called in a Latin phrase a per se violation. That is on its face and by itself it is a violation of the **[2873]** law, and no matter what intent the parties had, it is a violation of the antitrust laws, provided that they are dominant enterprises in a market. Never mind what the reasoning back of it is, just accept what I tell you,

that under those circumstances specific intent need not be proved by the plaintiff in order to succeed.

If he proves a price agreement among dominant enterprises in the market, that's enough, provided he also shows, of course, that that action was a substantial cause of damage to him.

Now, there are other cases in which it would not possibly be open to a jury to find that there was a specific intent, and there are intermediate cases where specific intent must be proved by the plaintiff, or if it isn't proved by direct evidence it must be reasonably implied from the total factual situation, including the position of the defendant in the market and the nature of the conduct. That was a very abstract statement, and I am going to try to make it more concrete for you.

Suppose that in a particular market, and I'm going to tell you what a market is in a moment, the defendant has a dominant controlling position, and the defendant is a manufacturer of a particular kind of product, let us say shoe machinery. If the defendant refuses to sell such shoe machinery to people who want to buy it but only will **[2874]** agree to lease it on rental terms so that nobody can acquire the machinery except as a lessee, under those circumstances no matter what the intention of the manufacturer is the law implies that because of the dominant position which the machinery manufacturer has, and because of the interference with the freedom of choice of the proposed user of the machine there is a sufficient implied intent, and nothing need be proved beyond the position of the manufacturer in the market and

the form in which the manufacturer makes his product available exclusively by lease and never by sale.

There are situations which are quite different from that. But before I deal with them I am now going to interrupt my general train to drop a footnote to explain what the term "market" means, which I have been using frequently and which you have heard counsel use.

The word "market" may mean any identifiable branch of trade or commerce which has that kind of character which those who are in that trade or branch would recognize as creating a sufficient unity of demand and supply, so that there is, as it were, a market. And let me come right to the point of this case.

[2875] It is up to you to conclude that in this case there is a separate market for batch customers who use computer services or you may conclude that there is no such separate market and there is, in fact, only a market which includes all computer services, whether given on the basis of remote terminals or on the basis of batch deliveries.

The plaintiff has the burden of satisfying you that there is not only the larger market but, indeed, a smaller market, to wit, a market in which the demand and supply relate to batch data services rendered by computer centers. In other words, there can be a large market and a small market.

The plaintiff also has the burden of proving what is geographically the scope of the market. Of course, you could have a batch data market which covered the whole of the United States. You could have a batch data market

which covered the whole of the West. You could have a batch data market which covered just the City of San Francisco. You could have a batch data market which covered the Bay Area, including the various counties adjacent to San Francisco.

The plaintiff has the burden of satisfying you with respect to what are the appropriate markets. There may be more than one appropriate market.

If in what you find to be an appropriate market there are a number of different ways of satisfying the demand in that market, you will, of course, take it into account.

[2876] For example, with respect to batch data services in the Bay Area, you can take into account what centers there are that render such service by one or another type of machine.

It would be an impermissible restraint of trade if there is, in a given market, a dominant company which coerces customers and interferes with their freedom of choice. If there is coercion by a dominant force in the market, the plaintiff need not prove any further specific intent because the coercion, by itself, implies a specific intent either to monopolize or to exclude from the market or, as it were, to freeze or squeeze.

But, let us take another possibility, hypothetically considered, in order to make clear to you what the law is.

Suppose that a dominant force in the market makes false representations. By themselves, those are not sufficient facts to bring about a violation of Section I of the Sherman Act and to constitute an unreasonable restraint of trade. It is only under those circumstances when the

plaintiff proves that the defendant, in addition to being an important force in the market and in addition to having made false representations, did it with the specific intent to monopolize that market or to exclude the plaintiff from that market or to freeze the plaintiff out of the market or to squeeze that plaintiff in an anticompetitive manner.

I think I recognize how difficult this problem is; and **[2877]** that is one of the reasons that after I get through with my statements on the law, I am going to offer you an analysis which you are free to accept or reject.

What I have told you so far is a rule of law.

Now, if I turn from the problems raised by the first issue, that is, did the defendant violate Section I of the Sherman Act, I must help you in one aspect of law which is local and not the Act of Congress but the acts of the California Legislature and the California Courts.

You will surely remember that there was a great deal of testimony with respect to what kinds of pieces of paper and what kinds of contracts, if any, there were in 1970 which bound or did not bind customers to the Burroughs Data Center being operated in San Francisco. The question as to whether there were any contracts and, if there were contracts, they were as has been said, assignable or delegable with respect to performance is the reason I need now explain to you a question of law of California and not a question of Congressional law.

With respect to this phase of the case, the burden of proof is not upon the plaintiff, the burden is upon the defendant. The defendant has the burden of proving that

there were contracts and that they were delegable, assignable, with respect to performance.

It seems to be generally agreed that, on their face, these pieces of paper stated that they did not become contract **[2878]** unless they were approved in Detroit by the home office of Burroughs Corporation. So, no matter what Mr. Browne or anybody else may have said on the witness stand, it is the position in this litigation at this stage, taken by Burroughs, itself, that there were no written contracts which were in force and effect in 1970, before late in April or thereabout. They were signed in the home office in Detroit by Mr. [illegible]ily or someone there. But the defendant argues here that even though there were no written contracts in 1970, there were contracts by conduct.

Now, the law, with respect to this, is that it isn't necessary that contracts of this kind be in writing. Contracts of this kind can arise by conduct or orally or by the relationship of the parties in many different ways. And it is a question of fact for the jury as to whether, indeed, the relationship between Burroughs' center and its customers in 1970, in January, February, March, and so forth, shows that these customers and Burroughs, by their conduct, intended to be bound.

Now, it has been suggested that the relationship was an ongoing relationship. On the other hand, you are entitled to take into account that the parties may or may not have thought that they wanted the protection of a written agreement and they didn't intend to be bound unless they got a written agreement. That is a question of fact for you.

It may be that some of the customers, certainly not [2879] all of them, were charged different rates in 1970 from 1969 and they paid these higher rates and thus showed that they intended to be bound even without any signed approval from Detroit.

I am not trying to tell you whether the conduct did or did not amount to a contract by conduct instead of a contract in writing. It is all a question of fact for you.

The burden with respect to it, unlike the burden on most of the issues on this case, rests upon Burroughs, as defendant. If Burroughs does prove to your satisfaction, by a preponderance of the evidence, that there were contracts by conduct, Burroughs then has the burden of proving too that those were contracts which could be properly satisfied by Burroughs' getting the performance of the contracts done by somebody who was competent but who was not necessarily in the employ of Burroughs.

This has been referred to by the parties and the witnesses as though it were an assignable contract. That isn't exactly the right term, but it is a convenient one.

Was performance under these contracts delegable to somebody else? Could it be assigned to someone else? The plaintiff says no. And you will remember that Mr. Palmer said that, in his view, these contracts were not properly performable except by either the original computer center party or somebody who took over the business as a whole.

The position of the defendant is that contracts of [2880] this kind, whether in writing or arrived at by conduct, may be performed by anybody who is a reasonably decent, trustworthy workman-like operator of a computer center.

In that connection, the defendant calls to your attention the testimony of the degree to which this business has been assigned in the past and the evidence with respect to the assignment of business to various companies, including some not parties to this case, including the one, for example, that was testified to by Kalt.

I am not taking any position on this matter. It is for the jury.

I have tried to give you an illustration earlier in the case, as you will remember, but the illustration of the pencil factory and the opera singer, Madame Wagner, is perhaps no longer necessary to have you recall. It would be sufficient for you to think whether, after you have listened to all the testimony, you do or do not have a view that the defendant has proved that this kind of work may properly be delegated to any competent workman-like, trustworthy enterprise.

After that excursion into the problem of contracts and their assignability, I now come back to the main issue in the case and turn to the question which is raised in regard to the plaintiff's claim that there was a substantial impact, as the plaintiff calls it.

In other words, did the defendant, if it violated [2881] Section I of the Sherman Act, substantially cause injury to the plaintiff.

Now, it isn't necessary, in order to satisfy its burden of proof, for the plaintiff to show that the defendant was the only cause of the injury. What the plaintiff must show by a preponderance of the evidence was and is that the defendant's wrongful conduct was a substantial cause of the injury.

Now, I would like to draw sharply your attention to something which I am not sure was brought out very clearly in the argument.

The types of injury to which reference was made and on which at least the plaintiff sought to calculate damages are of two different sorts. One is the injury with respect to, as it is claimed, the loss of the opportunity to earn money from Burroughs' customers, who were having their data processed at the Burroughs' center. The other claimed damage and injury was with respect to concerns which had never been customers of either Burroughs or of Computerminal.

If you come to the conclusion that there has been a violation of Section I of the Sherman Act, you may, as I will point out a little later in my analysis, treat these two classes of possible, theoretical customers as having a different kind of relationship, if any, to the alleged violation.

I now come to the third main issue which you may or **[2882]** may not arrive at.

You recognize I have to charge you on every issue raised. It doesn't mean that you have to consider every issue raised. You cannot find for the plaintiff unless you consider all of these issues, but you can find for the defendant without considering them.

This isn't a temptation to you to take the short cut. I am just telling you that the fact is that if you don't find any liability on the part of the defendant, if you don't find any violation of the Sherman Act by the defendant, you don't have to consider anything else.

Now, what about the rules of law with respect to damages? The plaintiff does have the burden of satisfying you by a preponderance of the evidence of the fact of damage, but it is recognized in many cases binding upon you and me that if you are satisfied that the plaintiff has borne the burden of proving the fact of damage, a considerable latitude is allowed with respect to the extent of damages.

If the defendant has, indeed, violated the Sherman Act and that violation has been a substantial cause of a particular kind of injury to a particular group of customers or through a particular group of customers, then if the plaintiff has also shown the fact of damage with respect to either or both of those kinds of customers, the defendant runs the risk that those figures cannot be very precisely ascertained because it is **[2883]** its wrongdoing, hypothetically, which has created the uncertainty.

Now, there is one other point that I must instruct you on with respect to damages. Notice carefully that on this point the defendant bears the burden of proof, not the plaintiff, just as with respect to the problem in connection with contracts and their assignability and whether or not they exist by conduct as well as by written agreement, the defendant has the burden of proof.

Before I come to state this issue, I want, in order to sharpen it, to distinguish another somewhat similar but different problem.

If a company is economically ailing and it is possible that it would have gone out of business through its poor management, or the like, the defendant does not get the benefit of that as an excuse for paying less in damages.

If I may give you a homely and frequent illustration, if the defendant, in a personal injury situation, were to hit a man who had had a heart attack and the man was seriously injured, the defendant has to pay for the injury even though, if the man had had no heart attack, the injury might not have been so serious.

You take, in a personal injury or other tort action, including an antitrust action, the plaintiff as he is. And if the defendant injures a weak and sickly corporation and the injury is worse than it would be if it were a healthy [2884] corporation, that is no excuse in mitigation of damages.

However, what the defendant claims here is something different. And I am not saying that the claim is sound, I am just placing it in front of you for your consideration, reminding you that on this issue the defendant has the burden of proof.

The defendant says that in this particular case the plaintiff was under a contract to go out of business and, therefore, the period of damage cannot last longer than the period during which the plaintiff had contracted to stay in business or had contracted that it would go out of business. Obviously, if a corporation were created by the legislature to be not a perpetual corporation but a corporation which was to last ten years and you injured the corporation in its ninth year, the only damages which the corporation could get would be what it would have lost in earning power in the tenth year. You couldn't take into account the twelfth, fifteenth, or nineteenth year as you may in the case of a corporation which had perpetual life.

Now, it is the claim of the defendant in this case that as a result of negotiations originated perhaps by Mr. Wessel—it is up to you whether you agree with this—but it is the defendant's contention that there were negotiations between Mr. Wessel and Mr. Leidersdorf and Mr. Coleman, representing either himself or Mrs. Coleman or both, and there were [2885] contributions made in the Winter of 1969-1970 under which there was an express agreement that if the remote batch business didn't work out within the period of time contemplated, the whole of the business of Computerminal, batch data as well as everything else, would be abandoned and there was a subscription, according to the defendant, made on that basis and accepted on that basis by Computerminal and that there, therefore, was, in the defendant's view, a contract of termination; so that there could not have been, no matter what the defendant did, any interference with the operations or possible revenues of the plaintiff beyond the period of time which the defendant was to remain in business, the plaintiff having agreed, in the defendant's view, to go out of business, as it turned out, when there was a failure of financing, and going out of business would have occurred, in any event, according to the defendant, in the Summer of 1970.

It is up to the defendant to bear the burden of all of that, and you don't have to believe any of it. You don't have to believe that Mr. Wessel made any such arrangement or that he had any authority to or that there was any ratification of it by a subscription or that there was any firm agreement on the part of the corporation or that the corporation would have gone out of business anyway.

But if you do believe all of those things, if the defendant does persuade you, then that would, of course, impose **[2886]** a legal limitation upon the period that the corporation would have remained in business, regardless of any wrongdoing, if there were any, of the defendant. And that is a fact that has to be taken into account in connection with damages.

Now, I have, I think, said all that I want to say except one other point of law before I turn to the analysis.

You will bear in mind that the pretrial statement and Paragraph 19 of the complaint, as well, make it abundantly clear that the wrong here complained of and here before you for adjudication has to do with an alleged combination between the defendant Burroughs and Cubit and/or customers. If there were any such agreement, it is said to have been one with respect to or having the effect of interfering with the plaintiff's, Computerminal's, rights, not some individual rights.

If there were any such contract, combination, or conspiracy, Paragraph 19 of the complaint and the pretrial statement make it plain that it reached its culmination by the contract of April 16, 1970. That is the date.

I have said all I am going to say about the law, and now I am going to turn to problems of analysis. I underline as strongly as I can that from now on anything I say you may disregard. I am not now hereafter giving you any instructions on the law.

[2887] This is not entitled to any more weight than you want to give it. It may or may not help you. You may or may not think it's fair. I am going to try to be

fair. As I listened to the arguments, I hope I correctly understood that there was a threefold thrust by Mr. Alioto on behalf of the plaintiff in his argument to you as to why he has shown that there was a prohibited unreasonable restraint of trade by Burroughs.

Now, if I understood him correctly he said, first, there was a specific intent to destroy Computerminal; and, second, he said that the whole situation was one involving coercion by Computerminal and Cubit with respect to customers which Burroughs already had; and, third, he said that there were implied and expressed misrepresentations made by Burroughs which in some cases reached directly to the Burroughs customers and in other cases some how or other floated down a grapevine, if you float down a grapevine, at any rate, went down a grapevine in the direction of the total potential market of potential customers, not only those that Burroughs already had or that Computerminal already had, but those that might by possibility show up in the San Francisco area.

Now, let me look at these three different situations or claimed situations, and they may be cumulative, one as well as the other, or they may be alternative, one instead of the other.

[2888] Did the plaintiff show by a preponderance of the evidence that the defendant had a specific intent to destroy Computerminal? Well, let's take the strongest thing which wasn't, for some reason, much played upon in the arguments.

Mr. Browne didn't have a very lovely attitude toward the plaintiffs, at least by the time the deal fell through,

and there is no doubt he wrote a rather ill-tempered memorandum. But there is no evidence, is there, that anybody acted on that memorandum? There is no reason, is there, to suppose that that particular remark, which surely was not one of encouragement, ever got any approval from either Mr. Baily or anybody else in real authority at Burroughs, or that it was followed up in any way whatsoever? And it is pointed out to you by the defendant that if there were really a specific intent to destroy Computerminal, it's rather strange that Burroughs didn't do what it had a perfect right to do, to recapture the machine for non-payment of rent. Burroughs allowed unpaid rent to accumulate until it was over $100,000 and was, as has been pointed out to you, the real method of financing Computerminal in the continuation of its business. So it's rather hard, isn't it, to look at this evidence and say that Burroughs started out with the intent to destroy Computerminal.

But now let's look at the second of these, as it were, strings to the bow of Mr. Alioto with respect to restraint [2889] of trade. You will remember that during the examination of Mr. Browne and at other stages in the case it was brought out by Mr. Alioto that Burroughs was in an ambiguous situation of being both the manufacturer of machines, and in San Francisco the operator or user of the machines in a center, and that in its capacity as operator or user of machines, Burroughs was in potential, if not actual competition with every other user of Burroughs' machines including, of course, Computerminal and including Cubit, and the suggestion made to you is that it was under these circumstances rather coercive for

Burroughs together with one of its competitors at the computer center level, i.e., Cubit, to go to customers of Burroughs and try to persuade them to deal with Cubit and not to deal with anyone else. It is certainly at least a ground for careful inquiry when a manufacturer of a product accompanies one of the users of its product in going to ultimate customers and urging those ultimate customers to use or to take their business to a particular lessee or purchaser of the manufacturer's machines. On its face this could be found but not must be found to be a restraint and interference with the free market.

However, you are also to take into account not only that aspect which on its face invites scrutiny, but you are to realize that in this particular situation the manufacturer was not just going around with one user of machines to see [2890] ultimate consumers, the manufacturer was going out of business in its own capacity as a user in San Francisco of its own machines. The defendant points out that in its view it was trying to salvage what it had here in San Francisco. It had made up its mind to go out of business in San Francisco and it wanted to get as much as it could for whatever it had in the way of good will, i.e., customers.

Now, you will remember that early in this charge I referred to the problem of A who owns a business and wants to sell it and X, Y and Z are possible purchasers, and A sells to X and that cuts out Y and Z. And that it must be permissible for A to sell to somebody, even though it does have an adverse effect on the people who want to purchase it, they are restrained but not unreasonably restrained, because if you didn't let A sell to

anybody you are really saying you have got to take a loss, you can't sell your business.

Now, surely, the antitrust laws don't prevent Burroughs in its capacity as the operator of a center in San Francisco from selling its business. Surely, the antitrust laws don't operate to prevent Burroughs selling its customer list, and if it has contracts, from selling contracts, or even the hope of contracts.

So the problem is really whether there was any coercion in these particular circumstances, or whether what was going on was merely a salvaging of the business.

[2891] Now, in stating the argument both ways, I hope you don't think I am deciding that issue, because that's an issue for you, but that's the problem.

Now, with respect to this, of course, a lot turns on what went on at those conferences. And remember, who has the burden of proof to bring the witnesses. Are you satisfied that you really know what went on at those conferences? Remember that it's the plaintiff's claim that there were a number of customers who were being coerced. I hope I don't misstate it when I say that the only customer that testified here in person, Mr. Zusman, didn't seem to think he had been coerced. And although Mr. Arnstein of Forbes may have taken a different position, all we know about him is what was read in evidence from some prior testimony of his, not by any means a complete account of what he testified on that occasion.

We also know, of course, what Mr. Browne said. And it is perfectly true that Cubit is a named conspirator,

and you might not expect Cubit to be called, or you might think Cubit would be called, it's up to you.

Now, let's look at the third string to the bow, the supposed misrepresentation.

Now, Mr. Alioto in his examination of the witnesses certainly took quite a little time, and I didn't mean that he took too much time, to bring out what was said by Mr. Browne **[2892]** and others. But most particularly by Mr. Browne, and what the correspondence and notes, notices and so forth said about these 1970 pieces of paper or contracts. I don't think you and I would give Mr. Browne a certificate as a representative who understood the law very well before he testified.

And I don't think that you or I would be much impressed with his consistency. I certainly made it plain that I thought he had said one thing one day and another thing another day. And I am not sure if even now he has a clear idea, for that matter, I am not sure that anybody has a clear idea about what the legal situation is with respect to those pieces of paper, because until you have spoken we don't know whether there were contracts by conduct.

There may have been a correct representation, there may have been an incorrect representation. We don't know until you have spoken whether those contracts were able to be performed according to their implied intent by any competent company or not. The plaintiff has the burden of showing there was a misrepresentation, but if there were a misrepresentation the defendant could certainly avoid its effect by showing that it was made in

good faith. But the defendant would have the burden of showing that it was made in good faith.

Now, you may remember, going back to where I first started to tell you about the complexities of the law with **[2893]** respect to restraint of trade and telling you that I didn't think even all justices of the Supreme Court of the United States would agree upon it, I did make plain to you that when you were dealing with alleged fraudulent misrepresentation or alleged bona fide negligent misrepresentation, there is no violation of the Sherman Act. There is no restraint of trade prohibited by Section 1, unless there is, in addition to the misrepresentation, either a dominant control of the market with an anticompetitive intent or, alternatively, a specific intent to monopolize, to exclude, to freeze out of the market, to squeeze in some way beyond merely injuring.

Now, I hope you realize the difficulties these problems are. They are ones in which the common sense of the jury perhaps governs much more than is always recognized, because ultimately, frankly, issues of this kind turn to a large extent upon credibility. You listened to arguments yesterday as to who is truthful, if anybody, and how truthful. As I listened to the testimony I could not help thinking of a line which some of you will know, from Shakespeare's sonnet, which talks about that not being love which alters when it alteration finds; that is not truth which alters when it alteration finds. Or, as Archbishop Whately said, there is all the difference in the world between putting truth in the first place and the second. And you are just as good in judging truthfulness as any group of people ever will be.

[2894] Now, if you do find that there has been a restraint, you will then have to deal with the question of causation. Now, I, in talking to you about the law, and before I came to the analysis which you are not required to follow, noted that there were two different supposed kinds of customers who would otherwise have given business to Computerminal but who were diverted by the violation of the antitrust laws as claimed.

Now, look at the position of these two classes of customers. There is no doubt, of course, that Burroughs was in touch with its own customers. Burroughs went around and visited its own customers. But what did Burroughs say to its customers? Is there a word of explicit kind indicating that Burroughs ever said anything disparaging about Computerminal. Of course you may disparage without being explicit. If at the moment I were to praise Mr. Alioto and to say nothing about Mr. Gillam, I think in this context you would conclude that I was not only praising Mr. Alioto but dispraising Mr. Gillam, because it would be rather unusual, wouldn't it, in the course of a matter of this kind for me to single out one lawyer for praise unless there was some very exceptional situation.

But here we face the rather peculiar situation that if Burroughs by praising Cubit is supposed to have dispraised Computerminal, why isn't it equally true that Burroughs was dispraising every other batch data center in San Francisco. **[2895]** And has anybody said that others thought they were being disparaged? Is there any proof of that?

Now, what about the people who weren't customers of Burroughs but were potential customers. There are people

around San Francisco who have or might have batch data work to be done. There is no claim that Burroughs went to see them. But we are told that a grapevine somehow reached them.

What is traveling on this grapevine? That Burroughs sent its work to Cubit? Is there anything traveling on this grapevine about Computerminal? And if it's traveling on this grapevine does the grapevine also say that Burroughs has still left its machine with Computerminal even though Computerminal hasn't paid all of the rent? What kind of grapevine is this?

If the grapevine carries the story that Computerminal isn't paying its rent, it happens to be true.

Well, I am not going to say anything at all about damages. I am well aware that about 60 percent of the testimony and more dealt with damages, and maybe almost as much of the argument. If you didn't get what the testimony had to say and what counsel had to say on that, I don't think you will be much enlightened by what I would say. I tell you once more that in connection with this case the burden of proof on each of the three main issues rests on the plaintiff, but there are certain subsidiary issues that I have referred to **[2895-A]** such as the supposed contracts and the supposed assignment and any privileges with respect to truth with regard to representation, and any suggestion that there is a shorter life of Computerminal because of its supposed contract with Messrs. Leidesdorf and Coleman are issues as to which the burden of proof rests upon the defendant.

[2896] I have tried in the analysis to look at the matter with detachment, but you don't know whether anybody can state a matter so that everybody thinks it is detached. I hope I have the kind of bias against bias which I referred to before. I know that, like everybody else, I am bound to have a certain number of prejudices, but I do my best to combat it.

In the end, I would say that the reason it is so fortunate to have a jury case instead of an nonjury case in this field is because, as I have repeatedly said, the ultimate test here will turn out, I am sure, to be credibility.

Everyone who comes into a court swears by God to tell the truth, the whole truth, and nothing but the truth. I doubt very much whether many people who take the oath fear Jehovah, but most of them fear jurors.

You may or may not think that someday you will face St. Peter or, in the inferno, Minos, but you are in the position, as it were, of the eternal judge of the truth of this matter. You are engaged in a very solemn undertaking.

This is not a simple case, and I have not been able to reduce it to an easy problem because it isn't easy.

I have been in the habit of saying, for many, many years, that when my children were young and I was already a judge, at the end of a jury case, I would go home and tell my children, as best I could, what were the facts in the case and try to get from them a judgment as to how the case should be **[2897]** decided. In one sense, it worked very well. Both my children have become lawyers.

I am not suggesting that your children will become lawyers, but if you do this job before you in the spirit

of imagining that you are to tell your children or grandchildren about this case and what you decided, if you have that sense of consciousness that you would have when you were in the position of instructing the young, I have very little doubt that you will reach a sound verdict.

Mr. Clerk, will you please pass the two forms to the Foreman, number one? I don't know whether he is the Foreman or not.

You will see one form is for plaintiff and one form is for defendant. If you find for the plaintiff, you put in a figure in dollars. You don't give us any real reasons or anything of that sort, you just put down the figure. If you find for the defendant, you just fill out the form without any figure.

You, of course, are required to be unanimous, the six of you.

Needless to say, when you go into the jury room, you may start with a difference of opinion. Listen attentively to one another. You are just as good a jury as ever is going to sit on this case. It is very important that you be decisive. After all, it has taken a month of your time, a month and more, **[2898]** and a great deal more of Counsel's time, and a month of the Judge's time, not to mention the parties' and the witnesses' time. It has been an expensive business no matter how it comes out.

Nobody is going to compel you to reach a verdict against your conscience.

It may very well be that you can return a verdict in a very short time. Maybe you can't, but, as I have indi-

cated, if you can't do it quickly, I intend to hold you. If you do it quickly, that is all right, but I am not urging you to avoid staying overnight. That is up to you to act conscientiously.

Is there anything else, gentlemen?

Mr. Alioto: No, Your Honor.

Mr. Gillam: No, Your Honor.

The Court: Will you please retire to consider your verdict under the circumstances usual in this Court, whatever they may be.

Appendix C

United States District Court
Northern District of California

C 71-479 SAW

Edward Walsh, Trustee in Bankruptcy for Palmer Data Corporation

vs.

Burroughs Corporation

ORDER
April 29, 1976

WYZANSKI, Senior District Judge

Whereas in open court on April 28, 1976, simultaneously with the delivery to the clerk of an opinion for filing, this Court (1) denied defendant's motion for judgment n.o.v., (2) granted defendant's motion to set aside the jury's verdict of February 6, 1976 and the judgment entered thereon on the same day, (3) denied all other pending motions, no matter by whom filed, and (4) ordered a new jury trial to begin Wednesday, September 29, 1976; and

Whereas, the parties at the hearing on April 28, 1976 drew to this Court's attention certain additional authorities,

Now, therefore, it is ordered that:

1. This Court, having examined the authorities, does not alter its April 28, 1976 orders recited above.

2. Nothing in any previous order or in this order indicates that this Court has concluded that for the type of action here involved the plaintiff is not required to prove a specific anti-competitive intent in order to prevail.

3. Nothing in any previous order or this order indicates that this Court will permit to stand a judgment which awards plaintiff damages for any period after July 1970 when, pursuant to an alleged agreement, Computerminal ceased to perform batch data processing; and indeed this Court would welcome the prompt filing by defendant of a motion seeking, on the basis of the transcript of the January-February 1976 trial in this case, a summary partial judgment barring plaintiff from any recovery which includes any period after July 1970, such motion to be accompanied by specific transcript quotations, and with the right of plaintiff to file counteraffidavits and a brief quoting other transcript passages.

Charles E. Wyzanski, Jr.
Senior District Judge

Appendix D

In the United States District Court
Northern District of California

No. C 71-479 SAW

Edward Walsh, as Trustee in Bankruptcy for Palmer Data Corporation d/b/a Computerminal,
Plaintiff,
vs.
Burroughs Corporation,
Defendant.

[Filed Mar. 13, 1974]

JUDGMENT ON JURY VERDICT

This action came on for trial before the Court and a jury, The Honorable Stanley A. Weigel, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict.

It Is Ordered and Adjudged:

That the plaintiff, Edward Walsh, as Trustee in Bankruptcy for Palmer Data Corporation d/b/a Computerminal recover of the defendant Burroughs Corporation the sum of Three Million Eight Hundred Eleven Thousand Five Hundred Dollars ($3,811,500.00), with interest thereon from the date of entry of this Judgment at the rate of eight (8) per cent as provided by law; costs and

attorneys' fees are hereinafter to be determined, taxed and awarded.

APPROVED AS TO FORM:

/s/ Joseph M. Alioto
Joseph M. Alioto
Attorney for Plaintiff

/s/ Max E. Gillam
Max E. Gillam
Attorney for Defendant

Dated at San Francisco, California
this 13 day of March, 1974.

Stanley A. Weigel
United States District Judge

Appendix E

In the United States District Court
for the Northern District of California

No. C 71-479 SAW

Edward Walsh as Trustee in Bankruptcy for Palmer Data Corporation dba Computerminal,
Plaintiff,

vs.

Burroughs Corporation,
Defendant.

[Filed Jun 25, 1974]

ORDER

The cause came on to be heard on the Motions of Defendant Burroughs Corporation for Judgment Notwithstanding the Verdict and For a New Trial, and on the Plaintiff's Application for Attorneys' Fees Pursuant to Section 4 of the Clayton Act. Upon giving due consideration to the Motions and arguments of counsel and upon review of the entire transcript and trial,

It Is Hereby Ordered That:

1. The motion for judgment nothwithstanding the verdict is denied;

2. The motion for a new trial with respect to liability is denied;

3. The new trial motion is granted on the question of damages; and in the light of that,

4. The motion for counsel fees is denied without prejudice.

Dated: Jun 25, 1974

Stanley A. Weigel
District Judge

Appendix F

In the United States District Court
for the Northern District of California

No. C-71-479 SAW

Edward Walsh, as Trustee in Bankruptcy for Palmer Data Corporation dba Computerminal,
Plaintiff,

vs.

Burroughs Corporation,
Defendant.

[Filed Feb. 12, 1975]

ORDER GRANTING MOTION FOR NEW TRIAL

This matter having duly come in for hearing, counsel for the parties having been heard, their briefs having been considered and the Court having reached its decision,

It Is Hereby Ordered that plaintiff's motion for a new trial on all issues is granted.

Dated: February 12, 1975.

Stanley A. Weigel
Judge

Appendix G

United States District Court
for the Northern District of California

Civil Action File No. 71-479 SAW

Edward Walsh as Trustee in Bankruptcy, for Palmer Data Corp., dba Compu-Terminal

vs.

Burroughs Corp.

[Filed Feb. 6, 1976]

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Charles E. Wyzanski, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged That the plaintiff recover of the defendant the sum of Three million, Four hundred and Eighty-Six thousand dollars, ($3,486,000), with interest thereon at the rate of 7 percent as provided by law, and attorney fees.

Dated at San Francisco, Calif.,
this 6th day of Feb., 1976.

William L. Whittaker
Clerk of Court
by J. M. Waggener
Deputy Clerk

Entered in Civil Docket 2/6/76